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No. ___

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIAM HENRY ROBERTS,

Petitioner,

v

PEOPLE OF THE STATE OF MICHIGAN,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

CASS S. JAROS (P 15453)
MARJORIE S. JAROS (P15454)
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(a) QUESTIONS PRESENTED FOR REVIEW

1. Petitioner was tried on two charges: murder in the second degree and possession of a firearm in the commission of a felony. He was sentenced to serve 1 to 5 years on the verdict of guilty of involuntary manslaughter and 2 years for violation of said firearm statute. The manslaughter was committed with said firearm. Did this constitute double jeopardy in violation of the Federal and State Constitutions?

2. Petitioner was sentenced by the trial judge to 1 to 5 years on the involuntary manslaughter verdict, but the Court of appeals, without any motion before it and without any notice thereof changed the sentence to 1 to 15 years in its written Opinion of December 10, 1979. Did this violate the Federal and State Consitutions' guarantees of due process?

3. Petitioner claimed he acted in self defense, which was corroborated by a witness.

There was no contradicting testimony. Also the prosecution argued an objective rather than a subjective test for self-defense. Was petitioner's constitutional guarantee of equal protection of the law violated by the trial judge's refusal to direct a verdict for petitioner at the conclusion of the prosecution's case?

Did the Court of Appeals' Opinion, affirming the verdict, and based on an objective not a subjective test for self-defense, deprive petitioner of equal protection of the law?

(b) Parties -- see caption

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(d) The only opinion herein was not reported.

(e) Matters sought to be reviewed are the trial court's oral denial to dismiss the so-called firearm statute on June 13, 1978, morning session (Tr. p. 26-27, see Appendix p. 1 A and Tr. p. 403-408, July 10, 1978, Appendix p 2 A- 4 A). Petitioner's Motion was made prior to the jury's entering the courtroom.

Review is also sought of the trial court's denial of dismissal at the conclusion of the prosecution's basic testimony on June 14, 1978 after 2 p.m. (Tr. p. 242-247, Appendix p. 4 A- 8 A). Petitioner claimed there was NO testimony refuting self-defense, hence the prosecution had not sustained its burden of proof.

Thirdly, review is sought of the Michigan Court of Appeals' change in the sentence in its Opinion of December 10, 1979 (Appendex p. 9- A - 12 A).

(iv) Petitioner believes that 28 U.S.C. § 1257 (3) confers jurisdiction on this court to review by writ of certiorari.

(f) CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

Constitution of the United States, Amendment V;

Constitution of the United States, Amendment XIV § 1;

Michigan Constitution, Art. 1 §2, 15 and 17;

U.S.C. 28 §§ 1257 (3);

M.C.L. 750.316, 750.317, 750.321.

M.C.L. 750.227b

(For verbatim accounts see Appendix, p. 17 A. et seq.)

(g) CONCISE STATEMENT

On April 10 and 11, 1978, petitioner, William Henry Roberts, hereinafter referred to as Hank, lived in one apartment above a bar in Trenton, Michigan. James Thomas worked at this bar and shared another apartment above it with Chuck McClain. Rose Blankenship, Thomas finacee, lived in another apartment with her son. Her apartment had a window overlooking the rear of the building. Immediately behind the bar were parking spaces for customers, beyond that was an alley and beyond the alley was a municipal parking lot. Gerry Ouellette was found dead in this lot by the investigating officer, about 100 feet from the bar.

Gerry Ouellette had spent the evening of the 10th and 11th with his girl friend, Darlene Parker, referred to as Kay. When they parted, she drove alone to Flat Rock, but had an accident on the way and was taken to a local hospital by medical attendants whom she

requested to notify her mother. Upon being notified, her mother called Thomas at the bar and asked him to go to the hospital to get Kay. He could not go, so she then requested him to ask Hank to go. When Hank arrived near the apartment entrance, Thomas relayed the request to him and lent Hank his car because Hank's car wasn't working.

While Hank was waiting in the hospital, two Flat Rock police officers arrived, and about 15 minutes later Gerry Ouellette came in and created a wild scene, cursing Hank and attacking him with his arm which was in a cast. The police officers interceded, protecting Hank from attack and joined Hank as he left the hospital. Petitioner testified as follows regarding this episode:

> "At that time the Flatrock police came in. They asked me if I was Mr. Ouellette. I said, 'No, I wasn't'. Then I asked them what happened and they told me that she had an accident... About that time Gerry Ouellette came in. The first thing he seen me and he start cussing and come at me like

> a madman. The Flatrock State police--the Flatrock city police officers stepped in between me and Mr. Ouellette and he tried to swing at me over the police officers' shoulders and telling me he was going to get me, he was going to beat my brains in."

Officer Steve Tallman of the Flatrock Police force testified as follows:

> "We met Mr. Ouellette coming through the door of the hospital the night that we were at the hospital regarding Mrs. Parker. Mr. Ouellette came through the door; Mr. Roberts was standing at the emergency room desk, and as soon as Mr. Ouellette saw Mr. Roberts he just went wild and started yelling obscenities and was getting violent.

And he described petitioner's demeanor as:

> "Just a normal everyday demeanor. There was nothing outstanding about him.

He further tesified that Ouellette arrived at the hospital about 15 minutes after he and his partner arrived, and further described Ouellette's behavior as follows:

> "As soon as he saw Mr. Roberts he just went wild and started yelling and told him to get out of the hospital or he would break -- he had one arm in a cast. He said he

> would break his other arm if he didn't get out of the hospital. He lunged at Mr. Roberts and I stepped between them. We finally got them to back off. By this time we got Mr. Roberts to leave the hospital and we went out of the door with him."

He further testified that Ouellette's entrance was far from normal, that Mr. Roberts at no time came at Ouellette, that Mr. Roberts retreated the whole time, that Ouellette was the aggressor, and that Mr. Roberts made no fuss about leaving. Comparing the height of the two men he said Ouellette was taller--

> "I would say three or four inches, because I am six foot and I know he was looking down at me."

Officer Tallman's partner, Officer Walter Stanwick, characterized Ouellette's entrance to the hospital as boisterous and obscene and petitioner just attempted to avoid him.

When Kay was released, Gerry drove her to the rear of the bar, and went upstairs alone looking for Hank. His loud knocking, kicking and voice woke Rose and disturbed McClain, who ordered Gerry to get out.

Gerry then proceeded to the Trenton Police Station, about one block away, which he entered alone. Officer Charles Newsome testified to this encounter, as follows:

> "I was in the station alone and he came to the front desk. The first think he said was I had better get a couple cars with some men in it in the area of the State Bar because he was going to go looking for someone... I knew him personally. I asked him what for. He said that he has been causing trouble with him and his girlfriend and when he caught him that there was going to be some trouble... I told him at the time that the State Bar was closed. I said, 'Gerry you can't find anyone at the State Bar it's closed due to the time,' and he said 'I'll find him. I asked him what was the trouble. He said the girlfriend was in the car and he was going to take her to Grosse Ile and drop her at the residence abd then come back and at that time there would be trouble...He was highly agitated and appeared to have been drinking."

His report was that Gerry was intoxicated.

Gerry then drove Kay home, telephoned her ex-husband and then Rose, sounding upset and mad. When he dropped the phone off the hook, Kay's mother picked it up and explained that background noises were Gerry slapping,

hitting and pushing Kay. Rose called back when the phone went dead and Kay warned her to warn Hank to get out of Trenton because Gerry had left to "get him".

When Hank returned Thomas' car keys, he received this relayed message. Also, Kay's mother called the bar and warned Hank to get out of town. But, without transportation, he couldn't. Thomas and Hank discussed the situation and Thomas offered Hank a gun, advising him that if he had to use it, to shoot Gerry in the knees.

At about 3:30 a.m. two postal workers who were going to work parked in the municipal parking lot and were approached by a man with a cast on his arm who was looking for someone there.

When Hank left the Bar to go to his apartment, he was confronted by Gerry. Hank repeatedly told Gerry he didn't want any trouble, to get back in his Van and to leave him alone. The two argued. Gerry

consistantly advancing and lunging at Hank, and wielding his cast like a weapon, and Hank consistantly retreating. Whether Gerry was otherwise armed at this time was not inquired into at the trial. Each time Hank attempted to sidestep, Gerry swung his cast, trying to hit Hank with it. In this fashion Gerry chased Hank from the customer's parking area, across the alley and into the municipal parking lot about 100 feet from the building.

Hank was becoming increasingly fearful that Gerry intended to kill him. Finally, shaking, Hank pointed the gun at Gerry's leg and said "I'm going to shoot you in the leg if you don't leave me alone. I don't want any trouble." But Gerry continued his assault and Hank pulled the trigger, hitting Gerry in the leg. Gerry slapped at his leg once, but took several more steps forward and lunged again at Hank who stumbled as the gun accidentally fired again, hitting Gerry in the cheek.

The commotion of Gerry's van pulling in

behind the bar and the men's arguing aroused Rose again and she watched from her apartment window and smoked a cigarette. Of course, she knew of Gerry's looking for Hank and she recognized their voices and could distinguish between them because she saw the cast on Gerry's arm. She testified that Gerry had telephoned her about 20 to 30 minutes after leaving when he first woke her, and that he returned to the parking lot about 20 minutes after that. She said when they were arguing she could hear what they were saying a little bit. She testified as follows:

> "...and Jerry kept coming at him. He said -- you know -- 'you got the gun' -- you know -- shoot it. Fire it.' Gerry kept coming at him, and then I had a cigarette in my hand and I turned around to put my cigarette out and I heard one fire -- one gun shot....I looked out and Gerry was like this, (indicating), bent over...Then Hank shot again and he fell."

On being interrogated about the time lapse between shots she responded

> "They were pretty close together."

On being pressed to express this in terms of time, she responded, "Approximately a minute."

(h) COURT PROCEEDINGS

Petitioner's Preliminary Examination on first degree murder and possession of a firearm while committing a felony was begun April 20, 1978 before Honorable Audrey C. Stroia, Judge of the 33d District Court, Woodhaven Michigan, No. 78-7818 VY and was continued before her in the morning of April 24, 1978. The charges were not put into the record. As soon as the prosecutor moved that the Court bind petitioner over for trial, petitioner moved for dismissal on both counts, saying:

> "Count II is dependant upon the Count I being a criminal act. It is the duty of the Prosecution to show that a crime was in fact committed before they move on. They have failed to do that."

His argument continued, emphasizing self defense and the fact that peititioner was in the vicinity of his residence and deceased hunted him down there, citing and quoting from People v. Collins, 322 Mich 319. (Also see where this case was argued and quoted at the trial, p. 5A hereof.)

While concluding the examination, the Court did not mention the firearm statute, but reduced the first Count to second degree murder and released petitioner on $50,000. cash/surety bond.

On arraignment on the information in Wayne County Michigan Circuit Court on May 9, 1978, at 8:30 a.m., the Court reduced the bond by accepting deposit of 10% thereof with the Court and not requiring surety.

The trial in Wayne County Circuit Court began June 13, 1978, before Honorable Charles S Farmer (case no. 78 813 790 FM) and ran to June 19, when the verdict was rendered. On July 10, 1978, petitioner was sentenced to 1 to 5 years and 2 years, respecively on the Counts (See p. 4 A).

In this Court, as soon as a "Walker Type" hearing was concluded, petitioner raised the issue that the firearm statute resulted in his being subjected to double jeopardy in this case and the Court denied the motion to

dismiss (See p. 1 A - 2 A).

At the conclusion of the prosecution's case petitioner argued that he was entitled to the right to defend himself, which he had done, and the prosecution failed to carry the burden of proof on this point, rebutting claimed self defense, (See p. 5 A - 7 A), which burden was proof beyond a reasonable doubt. The Court denied petitioner's motion to dismiss on this ground on the theory that the Collins case (supra), which had been argued, was not a jury case. (See p. 8 A). At the sentencing, in consideration of an anticipated appeal, the Court continued the bond (See p. 3 A - 4 A).

Petitioner appealed to the Michigan Court of Appeals (No. 78-3404) on both the double jeopardy and self defense issues and argued orally before that Court which affirmed the Circuit Court but increased the manslaughter sentence to 1 to 15 years on December 10, 1979 (See p. 9 A - 12 A).

Next, petitioner applied for Leave to Appeal to the Michigan Supreme Court, repeating these two issues. Leave was denied on April 14, 1980 (See p. 13 A - 14 A, No. 64348)

He filed a Motion to Reconsider with the said Supreme Court, raising the same issues and adding the issue that he had been deprived of due process by the increased sentence of which he had no notice and no hearing, but was again denied July 23, 1980 (See p. 15 A - 16 A).

(j) ARGUMENT

DOUBLE JEOPARDY:

The felony-firearm statute, MCL 750.227.b, became effective January 1, 1977. Petitioner herein was sentenced July 10, 1978. On September 20, 1978, the Michigan Court of Appeals rendered 4 Opinions in cases where the statute's application's resulting in double jeopardy had been raised, namely: People v William McDowell, 85 Mich App 697; People v Gary Renard Hughes, 85 Mich App 674; People v Drake Johnson, 85 Mich App 752; and People v Robert Leon Mitchell, 85 Mich App 757. Each of these cases affirmed convictions of both a felony and the felony-arms statute. This gave a superficial appearance of state-wide concensus, however, each contained a dissent of one of the three sitting Judges. To resolve the substantial conflict among these lower courts on the issue of double jeopardy therein, the Michigan Supreme Court decided two cases together in 406 Mich 374 (June 1979), Wayne County

Prosecutor v Recorder's Court Judge, saying, as follows:

> "In Wayne County Prosecutor v Recorder's Court Judge (People v Alexander), the evidence indicated that the defendant, Annette Gail Alexander, shot and killed a man with a shotgun. She was convicted in a single trial of second-degree murder and felony-firearm. The trial Judge sentenced her on the murder conviction, but refused to impose the mandatory two-year sentence for felony-firearm because he believed to do so would violate constitutional prohibitions against double punishment. In People v Brintley, the evidence indicated that the defendant carried and exhibited a handgun while he robbed a woman. He was convicted in a single trial of armed robbery conviction and also imposed the mandatory two-year consecutive sentence for felony-firearm.
>
> "The question presented is whether separate convictions and consecutive sentences for both a felony and for felony-firearm in cases such as these violate the Michigan and United States constitutional prohibition against being twice placed in jeopardy for the same offense.
>
> "The Court of Appeals concluded in both cases that the Michigan and the United States Constitutions were violated, therefore vacated the defendants' respective convictions for felony-firearm.
>
> "We reverse, reinstate the convictions and remand People v Alexander

> to the trial court for imposition of the mandatory two-year consecutive sentence for for felony-firearm."

This was a 4 - 3 decision, which does establish Michigan authority in the matter, but is hardly evidence of a degree of concensus thereon. Also, since it bottoms on a Federal question, of which this Court is the final authority, petitioner urges that a serious public issue relative to human rights needs resolution by this Court.

Petitioner directs the Court's attention to the considered arguments set forth in the dissenting opinions of these 5 cases, particularly the Wayne County Prosecutor v Recorder's Court Judge case, supra, because the dissents support petitioner's legal position and clearly and persuasively show that petitioner's constitutional rights were violated by subjecting him to double jeopardy.

Petitioner also points out that in People v Stewart, 400 Mich 540, 549-550,(1977) that the unconstitutional aspect of double jeopardy would not even be cured if sentences ran con-

currently, because that could punish in several ways, including parole consideration, impeachment at subsequent trials, and habitual offender treatment.

Petitioner also argues that convictions based on different acts but committed in a continuous time sequence and in pursuit of a single goal have been considered double jeopardy. In People v Davenport (On Remand), 51 Mich App 484 (1974) the defendant had been acquitted by a Michigan district court jury of a charge of disorderly person, but some months later was convicted by a Michigan circuit court jury of the felony of resisting arrest which arose from the same transaction, and at p. 487, this second conviction was reversed, and defendant discharged, the Court saying:

> "prosecutors must, when confronted with a case such as this one, elect which charge to pursue."

Further, petitioner argues that if possessing a gun while using it, and

using a gun while possessing it are considered two acts in order to circumvent the prohibition of the 5th Amendment, the American Judicial system has evolved a method of proving that the Emperor is Clothed, "logic" (?).

Also, the Constitution provides the methods of its own amendment, which do not include that legislatures may circumvent it if they intend to do so and their intent is clear. The constitutional provision we are dealing with unqualifiedly provides--

> "nor shall any person be subject for the same offence to be twice put in jeopardy." (emphasis added)

This phraseology lends itself to a case by case scrutiny. In Rochin v. California, 342 U.S. 165, p. 168, This Court said:

> "Due process of law, 'itself a historical product,' Jackman v. Rosenbaum Co., 260 U.S. 22,31, is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice." (emphasis added)

Neither is it to be turned into a "destructive dogma" opposed to individual liberty, petitioner submits.

SELF DEFENSE:

The case of Mullaney v Wilbur, 421 U.S. 684 (1975) outlines some historical aspects of homicide in the English common law, reciting at p. 692 as follows:

> "At early common law only those homicides committed in the enforcement of justice were considered justifiable; all others were deemed unlawful and punished by death. Gradually, however, the severity of the common-law punishment for homicide abated. Between the 13th and 16th centuries the class of justifiable homicides expanded to include, for example accidental homicides and those committed in self defense."
>
> (emphasis added)

And in Michigan when a defendant claims he acted in self defense, the prosecution has the burden of proving beyond a reasonable doubt that he did not act in self defense, which is put as follows in People v Stallworth, 364 Mich 528, p. 535 (1961):

> "The burden of proof to exclude the possibility that the killing was done in self-defense rests on the prosecution. People v Coughlin, 65 Mich 704; People v Cathey, 220 Mich 628."

In People v Asbury, 257 Mich 297, 298-299

(1932) the Court said:

> "The burden was not upon defendant to satisfy the jury that he killed in self-defense. People v Cathey, 220 Mich 628; People v Lintz, 251 Mich 367."

The language of People v Collins, 322 Mich 319 (1948), wherein the Court reversed conviction without a new trial, which was argued herein before the trial Court at the conclusion of the prosecution's proofs is more emphatic, at follows at p. 322:

> "A fair reading of the record shows that there was no intention to commit murder. Collins was put in fear of receiving great bodily injury, and he did what he could to defend himself. He even might have been the aggressor to a certain degree, but the circumstances are such that he had good reason to be thoroughly alarmed, and in our opinion the record discloses that Collins' acts of aggression were only such as he believed were necessary for his own self-defense. After a careful read-reading of the record we can not help but come to the conclusion that the judge should have rendered a judgment of not guilty.
>
> (emphasis added)

Petitioner herein renews his argument that the prosecution had not met its burden of proof beyond a reasonable doubt, including

the exclusion of self defense, and that the Court should have dismissed the case when the prosecution rested.

Petitioner further argues that the following rhetorical questions posed to the jurors in the prosecutor's closing argument, mislead them as to the test for self defense. he queried:

> "Does he stay in the locked bar? Does he get on the phone and call the police?"

This ignores that it was very late, that the petitioner was in the close proximity of his residence and had a right to go home. It also ignores that he had no known privilege to stay in the bar or use its phone. But even more than that, it suggests that an objective test based on hindsight was to be employed in determining whether or not there was excusable self defense. Whereas, People v Cathey, 220 Mich 628, p. 632 (1922) states:

> "The burden is not on the defendant who makes the defense of self-defense to satisfy the jury of the truth of his claim. People v. Coughlin, 65

Mich 704."

In this case the Supreme Court set aside the conviction and ordered a new trial. The subjective test was implicit in People v Lilly, 38 Mich 270, p. 276 (1878), wherein the Court stated:

> "The jury should have been instructed in effect that if they were w satisfied that Lilly being at his own house had reason to believe and did believe from Kreiger's previous and present language, manner and actions, and what had already taken place, that it was necessary to inflict the wounds he did inflect upon Kreiger to save his own life or to protect himself from danger of great bodily harm, he was excused. Hurd v People, 25 Mich 405; see also the People v John Doe, 1 Mich 451; Pond v The People, 8 Mich 150; Patten v The People, 18 Mich 314; Erwin v The State, 29 Ohio St., 186.
>
> (emphasis added)

In People v Shelton, 64 Mich App 154 (1975) the Court stated at p. 156:

> "For over 100 years Michigan law has acknowledged the right of a person to act upon a reasonable belief that he is in danger of death or serious bodily harm. Actual necessity is not the test for self defense; where circumstances present

> a person with reasonable cause to believe he is in danger he may respond, even if his belief is later shown to have been a mistaken one. Pond v People, 8 Mich 150 (1860). See, also, People v Macard, 73 Mich 15, 40 NW 784 (1888), People v Giacalone, 242 Mich 16; 217 NW 758 (1928), and People v Cameron, 52 Mich App 463, 217 NW2d 401 (1974)."
>
> (emphasis added)

The basic test, therefore is the individual's own belief that he is in danger, based on all the circumstances as they appear to him at the time. See People v Tubbs, 147 Mich 1, 12; 110 NW 132 (1907). Also see People v Lennon, 71 Mich 298, 300-301; 38 NW 871 (1888).

Moreover, the burden of proof to overcome claimed self defense is beyond a reasonable doubt, being the same proof necessary regarding all other elements in criminal cases. In re Winship, 397 U.S. 358 (1970) decided that the reasonable doubt standard was essential to due process, and although a New York Family Law Court Act prescribed determinations based on a preponderance of the evidence,

such determinations lacked due process, stating at p. 361:

> "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, (though) its crystallization into a formula 'beyond a reasonable doubt' seems to have occurred as late as 1798, it is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the elements of guilt."
> (emphasis added)

Also see Ivan v. City of New York, 407 U.S. 203 (1972) which applied the Winship case retroactively, and Mullany v. Wilbur, 421 U.S. 684 (1975) especially 685.

In the instant case, factors and circumstances affecting petitioner's belief as to his situation of danger included his being openly attacked earlier that morning by this same assailant in a public place, which did not require self defense only because he was protected by two police officers who were not present later. When he returned Thomas' keys

he learned that this assailant had come to his residence seeking him out and that he was now returning for him. Under these circumstances, not only did petitioner fear for himself, but Kay, her mother, Rose and Thomas demonstrated fear on his behalf. In light of this, the Opinion of the Court of Appeals is clearly erroneous, turning the tables as to who was the attacker and who was attacked.

Also that Opinion stated as follows:

> "In a criminal prosecution, all that is required is that the prosecutor introduce some competent direct or circumstantial evidence as to each element of the crime charged so as to support the jury's finding of guilt beyond a reasonable doubt..."

However this negates the possibility of having the case taken from the jury by a directed verdict at the conclusion of the prosecution's case for failure to make out a case, although this is entirely proper. The law, as decided in the Winship case, supra, is that all the elements in a criminal case, whether it applies to juveniles

or adults, is that every element of the crime must be proved by the prosecutor beyond a reasonable doubt in order to meet the due process clause of the United States and Michigan Constitutions.

Petitioner further contends that the Court of Appeals failed to demonstrate an adequately objective judicial attitude to comply with due process of law, as is domonstrated below:

Prior to oral argument before the Court of Appeals, petitioner had been advised that he would have a half-hour to argue, and had prepared accordingly, but when his case was called, he was informed that because the prosecutor had not appeared he would only be allocatted 15 minutes, but much of even that time was usurped by one Judge's arguing that defendant had a duty, and should have retreated-- as if he hadn't done so.

Petitioner's position on double jeopardy has always been that the charge and <u>conviction</u> under the felony-firearm statute subjected him to it; whereas the Court's

Opinion states:

> "Defendant claims the convictions should be set aside on double jeopardy grounds." (emphasis added)

Petitioner's position on self defense was that there had been NO evidence on that point not that there had been "not sufficient" evidence as stated by the Court. The testimony adduced below on which the court relied in affirming conviction was that--

"deceased was out looking for him",

which supports petitioner's claimed self defense. Moreover the Opinion is based on "facts" manufactured by that Court, because there was no testimony at all on them. There was no testimony supporting the Court's assertion that defendant "brandished" anything. Rose was the sole eyewitness to the encounter and she testified that petitioner merely consistently retreated, pleading. Also, the Opinion refers to the deceased as "his unarmed victim" but there was no testimony whether or not deceased was armed during the encounter. Moreover, the question regarding

self defense should have been whether petitioner reasonably believed he was or could have been armed "even if his belief is later shown to have been a mistake". The Opinion asserts there was sufficient, conflicting testimony to justify the jury's conviction, further indicating that all that is required is "some" competent direct or circumstantial evidence, thereby ignoring that the burden of proof is beyond a reasonable doubt, which issue is amplified above.

Although this matter is argued separately below, for the purpose of pointing out the basic unfairness of the appeal, the petitioner states here also, that without the issue being before the Court, and without due notice or a right to be heard, the Opinion increased the sentence from 1 to 5 years to 1 to 15 years on involuntary manslaughter.

Petitioner was further denied due process and equal protection of the laws by the Michigan Supreme Court's denial of petitioner's

application for leave to appeal and denial of his motion to reconsider the case.

RESENTENCING - DUE PROCESS OF LAW:

Petitioner claims that the Court of Appeals' vacation of appellant's sentence on the involuntary manslaughter verdict of 1 to 5 years and resentencing of 1 to 15 years was in violation of the Michigan and U.S. constitutions by depriving him of due process of law. They provide:

> "No State shall...deprive any person of life, liberty or property, without due process of law."

and

> "No person shall...be deprived of life, liberty or property without due process of law."

No motion was before the Court relative to petitioner's sentence and he wasn't given notice about it. The first he learned of it was on receipt of the Court's decision. In order to satisfy due process, he was entitled to reasonable notice and a reasonable opportunity to be heard and present his case. See Dohany v Roberts, 281 U.S. 369; and Honeyman v Hanan, 302 U.S. 375.

Moreover, In re O'Dell, 365 Mich 429, which the Court of Appeals cites as its authority to resentence, is a case wherein the trial judge notified the defendant and had him brought to court for resentencing, thereby satisfying the requirement of due process.

DUE PROCESS - EQUAL PROTECTION OF LAWS

There appears to be no statute granting immunity from punishment for cases of self defense, but as pointed out at p. 20 above, it has been a common-law defense since at least the 16th century. Therefore it comes under the privileges and immunities protected by the United States Constitution, Amendment XIV. Of course the protection against double jeopardy is specifically set forth in the 5th Amendment, which is applied to the States by virtue of the 14th Amendment. The Court of Appeals Opinion attempts to make its resentencing without notice or a right to be heard exempt from the constitutional restriction against taking taking life, liberty or property without due process of law. But, how does the Court know what argument might be presented oppossing resentencing if the opportunity to argue is denied? Wherefore, petitioner thinks that the matters here presented are worthy of this Court's review under the 14th Amendment limitations on the state's judicial

processes.

Constitutional Law, John E. Nowak, Ronald D Rotunda, and J. Nelson Youngh, West Pub. Co., 1978, p. 676, points out:

> "There is no single decision of the Court in which a majority of the justices specifically recognize a 'fundamental right' to fair treatment in the criminal justice system for purposes of equal protection analysis. However, the Court has established this right through a series of related decisions." (emphasis added)

It also traces some of the development of the issues this Court has considered, thereby including them in the field goverened by the 14th Amendment and broadening the scope of due process and equal protection. For example it cites that Gitlow v New York, 268 U.S. 652 applied it to freedom of speech in 1925; in 1932 some elements of rights to counsel under the 6th Amendment were made applicable to review by the 14th Amendment in Powell v Alabama, 282 U.S. 45; and, although not without dissent, a changing standard of decency was recognized.

Rochin v. California, supra, observes that

the Due Process Clause of the Fourteenth Amendment imposes on the the conduct of criminal proceedings by the States, limitations that concern restrictions upon the manner in which the States may enforce their penal codes, and states at p. 169:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' Malinski v New York, 324 U.S. 416-417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder v Massachusetts, 291 U.S. 97, 105, or are 'implicit in the concept of ordered liberty.' Palko v Connecticut, 302 U.S. 319, 325."

It continues by indicating that the Court's function is in dealing not with the machinery of government but with human rights.

In conclusoion, petitioner states that no man should be punished by imprisonment, even for one hour, as the consequence of a trial lacking due process and equal protection of the law. And the ripple effect of one decision of this Court effects the judicial processes throughout the nation.

Petitioner submits that the denial of his motions for dismissal of the felony-fire-arm charge, and denial of his motion for dismissal of the entire case, but hinging on his right to defend himself, the Opinion of the Court of Appeals, and the Michigan Supreme Court's denial of leave to appeal, violate the standards of justice imposed upon the States by the United States Constitution's 5 and 14th Amendments.

RESPECTFULLY SUBMITTED BY:

CASS S. JAROS and

MARJORIE S. JAROS

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APPENDIX

The rulings of the trial Court (Wayne County, Michigan, Circuit Court #78 813-790 FM were not written but are confined to portions of the transcript of the record as is set forth in (e), supra, of this petition. The issue of whether the charges on second degree murder and possession of a gun during the commission of a felony constituted double jeopardy in this case had been discussed prior to trial, and on June 13, 1978, immediately following a "Walker Type" hearing, and before the jury panel was brought in, the following took place (Tr. p. 26-27):

> "MR. JAROS: I would like to make a motion for the purpose of the record anyway at this time.
>
> THE COURT: All right.
>
> MR. JAROS: Your Honor will refer to the allegations set forth where there is a use of a firearm in the commission of a felony. At this time I maintain that the prosecutor make an election. I can't charge-- it will place the defendant in jeopardy twice. Here is a gun used. The man is killed and

the second degree murder is charged. He is also charged with the second count of using a firearm in the commission of a crime. Therefore, I state the prosecutor must (make) an election and select which count he is going to proceed on because the facts arising out of one act; the shooting of the gun and the killing, therefore, placing two distinct felony charges as double jeopardy.

"MR. BIANCO: Your Honor, the test is not whether or not it arises out of one act. One can commit murder in the second degree with a number of instrumentatities, including one's hand. The legislature has seen fit to impose an additional penalty when one uses a firearm. It enhances the sentence but it doesn't put the defendant in double jeopardy.

"THE COURT: The Court will deny the motion. It is a new act that we are laboring under. I understand there are cases on appeal regarding the constitutionality of the Act. As of now the Court feels that it is constitutional and we will proceed under that theory.

"Bring the jury in."

And when petitioner was being sentenced on July 10, 1978, morning session, the following transpired (Tr. p. 405-407):

"MR. COLOMBO: (Interposing) Your

Honor, Mr. Jaros is now in Vermont at Cornell University for this week and he had indicated to me to relate to the Court that he would like to take an appeal on the question of that count two, carrying a gun in the commission of a felony, the two year sentence.

If your Honor will permit, he would like to have the bond that is presently filed with the court in the sum of $5,000.00 in cash put up by the father and mother to be continued until that question is determined.

You have discussed this with Mr. Jaros too?

MR. ROBERTS: Yes.

MR. COLOMBO: Are you in accord with that statement that I made to the Court?

MR. ROBERTS: Yes.

MR. COLOMBO: He will always appear, your Honor. I don't think there is any doubt at all that he wouldn't appear. Is that right?

MR. ROBERTS, SENIOR (The defendant's father): Yes, that's right.

THE COURT: Do you understand, sir, that you wish to contest the constitutionality of the compulsion of this Court to give you two years on the commission of the felony while possessing a firearm?

MR. ROBERTS: Yes, Your Honor.

The Court: Well, the Court is going to pass sentence on you. It is the sentence of this Court to have you turned over to the Department of corrections for a period of three years. The two years that the Court referred to is the imprisonment in this State preceding the sentence for the felony, that is, the commission of the felony. In other words, you will have one year for the involuntary manslaughter count which you were found guilty of, and the next two years is for the required statutory time to be spent for the commission of the felony while possessing a firearm. The maximum time, I should indicate would be from one to five years for the involuntary manslaughter. I would imagine he gets three months off for each year.

MR. COLOMBO: The two years there is nothing off on that, Your Honor. The other is three months per year."

Secondly, before entering his proofs, petitioner moved for dismissal on the grounds that the prosecutor had produced Rose Blankenship's testimony supporting petitioner's claimed self-defense, but no testimony negating it and had thereby failed to sustain his burden of proof. This was orally presented, argued, and decided on June 14, 1978, after 2 p.m., as follows: (Tr. p. 243-247)

"MR. JAROS: I anticipate at this time that counsel, for all intents and purposes of this motion has rested, because he has but one witness which I believe is perhaps not material to this issue, as I see it.

The motion is one based on the dismissal of the action for failure to overcome the necessary proofs to be submitted under cases of this nature. I am most particularly concerned in the direction of the case which I would like to -- should we proceed?

THE COURT: Yes, proceed.

MR. JAROS: I am sure Your Honor knows of this case, or others, People versus Collins, 322 Michigan, 319, a Supreme Court case. Most specifically, this case is not one -- I want to make clear -- involving a murder. It is a case involving a defendant that was convicted of an assault with intent to kill and murder. The case is somewhat, in a factual sense, perhaps has some of the factual issues here. There is a woman involved, and the allegations and the matter for consideration came before the Court because one man tried to kill the other man, and there a conviction was held. I would like to go right to the issues themselves. On page 322 the Court had reversed this conviction without a new trial. I draw the Court's attention to the bottom of the second paragraph, page 322: A fair reading of the record shows there was no intention to commit a murder. Collins was put in fear of receiving great bodily injury and he did what he could to defend himself.

He even might have been the aggressor to a certain degree, but the circumstances are such that he had good reason to be thoroughly alarmed, and in our opinion the record discloses that Collins' acts of aggression were only such as he believed were necessary for his own self defense. After a careful reading of the record we cannot help but come to the conclusion that the Judge should have rendered a judgment of not guilty.

I draw the Court's attention to the fact because here we have prosecution witnesses which have testified, and I am thinking of Miss Blankenship, where testimony shows that Mr. Roberts, the defendant, retreated, and Mr. Ouellette pursued him. All the other testimony submitted by the prosecution is one in that vein. We have a situation where, if Your Honor will recall the officer telling you how Mr. Ouellette came into that hospital in a very arrogant, demonstrative, vile manner, and cussing and swearing. Nobody asked M r. Roberts to leave the hospital. Mr. Roberts did leave with no problem. Mr. Ouellette was the aggressor at all times. All of the testimony we have here, even the last witness to be examined said "If Ouellette pushed him around he would do something to him." We are in a situation where the defendant does not have to stand and be beaten by a man who decides he is going to beat him because somehow in his mind he is going to vindicate himself with a love affair;somehow there is a problem in his mind that this man in interested in the girlfriend that he is living with.

I submit to the Court this case, because I believe -- while it is not murder itself -- that was one step before the murder: an assault with intent to commit murder, and I say that based on the facts so far, as I understand the case, the witnesses coming before the court -- but not all of those facts, as a witness talking about some blood tests -- and I say based on that, the Court should direct a verdict of not guilty at this time.

THE COURT: You may answer.

MR. BIANCO: Your Honor, Mr. Jaros imposes a defense, and really that is not a basis for a motion for directed verdict. The only way a court could direct a verdict would be based on the fact the people, taking the case in the best light of the P made out a prima facie case of murder. I certainly think, Your Honor, that we have done that.

The defense is a factual question. The jury can decide whether or not the defendant acted in self defense. There is enough in the record now to indicate that the defendant went way beyond self defense. The record indicate that once he had subdued that attack by shooting Ouellette in the leg he proceeded to put another bullet into the center of his skull and caused his death, and that is murder, I think, by anybody's standards. Your Honor.

I would remind the Court of the testimony of Rose Blankenship when she said after -- when she looked back at the window Jerry Ouellette was standing holding his knee. He certainly wasn't

any threat to the defendant at that time. Nevertheless, several minutes later a second shot was fired, and that shot was the shot that went through the brain of Jerry Ouellette causing his death.

THE COURT: The Court has the Collins case before it, and I see a difference in the Collins case and the one we have here. That is the reason for denying the motion.

The Collins case came up before Judge Krause without a jury. It was a factual situation. It was as trier of the fact that the Supreme Court said he should have found that there was sufficient provocation on the part of Vohl, who is the complainant in the Krause case. Further, Vohl had entered the bedroom -- broken into the house and entered the bedroom and attacked the defendant Collins.

I think what we have here is a situation where it is up to the jury to make a determination as to whether or not this defendant had been put in fear, or whether or not he was defending himself. It is up to the jury to make that determination. It is not one that this Court can render a directed verdict on, per your request, so the Court respectfully denies it.

Also there was evidence of a fight between Vohl and Collins in the Collins case. Vohl had inflicted some very bad bruises, and stitches were necessary for the defendant in the Collins case because of the fight.

Bring the Jury back in.

(emphasis added)

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM HENRY ROBERTS,

Defendant-Appellant.

DEC 10 1979

No. 78-3404

BEFORE: Danhof, C.J., and N.J. Kaufman and D.C., Riley, JJ.

PER CURIAM

Defendant was convicted by a Wayne County Circuit Court jury of involuntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm in the commission of a folony, MCL 750.227 (b); MSA 28.424 (2). He was sentenced to imprisonment for one to five years on the manslaughter conviction and to the mandatory two-year sentence on the felony-firearm conviction. Defendant appeals as of right under GCR 1963, 806.1.

The convictions arose out of a shooting

incident in a parking lot wherein defendant shot and killed his ex-girfriend's new beau. Defendant claims the convictions should be set aside on double jeopardy grounds. This same allegation has been discussed and dismissed by the Supreme Court in Wayne County Prosecutor v Recorder's Court Judge, 406 Mich 374; ___NW2d ___ (1979).

As an added assertion, defendant contends that the jury determination was not suported by sufficient evidence. In People v Clark, 88 Mich App 88, 90-91; 276 NW2d 257 (1979), we reviewed a similar such claim using the following standard:

"In a criminal prosecution, all that is required is that the prosecutor introduce some competent direct or circumstantial evidence as to each element of the crime charged so as to support the jury's finding of guilt beyond a reasonable doubt. People v Meadows, 80 Mich App 680, 691; 263 NW2d 903 (1977), People v Atley, 392 Mich 298, 309; 220 NW2d 465 (1974. It is for the jury, not the court, to weigh the evidence. People v Eastway, 67 Mich App 464, 469; 241 NW2d 249 (1976), People v Palmer, 392 Mich 370, 376; 220 NW2d 393 (1974."

Applying this standard to the facts of the

instant case, we find defendant's claim unsupported. Testimony and evidence adduced below established that the defendant knew the deceased was out looking for him, that, before their encounter, defendant accepted a loaded handgun although he knew the high probability of violence the encounter protended. Finally, that defendant brandished this deadly weapon against his unarmed victim and shot him, first in the knee, then in the head.

As an adjunct to this argument, defendant claims that there was not sufficient evidence adduced at trial for the jury to find that he was not acting in self defense. After a review of the transcripts and lower court records, we find that, although the jury heard conflicting evidence, it was properly charged on self defense and the evidence introduced was sufficient.

Finally, although the question was not raised, we note that the trial court imposed a lesser maximum sentence than provided for by

MCL 750.321; MSA 28.553. A fifteen year maximum sentence was called for rather than the five year term actually imposed. By statute MCL 769.8; MSA 28.1080 the trial court is required to fix the maximum as per the statute. See People v Robert A. Smith, 35 Mich App 349, 351; 192 NW2d 626 (1971). The Supreme Court has said that any sentence imposed which is not in accordance with the statutory maximum is a nullity. In re O'Dell, 365 Mich 429; 113 NW2d 220 (1962). Accordingly, we vacate defendant's erroneously entered maximum sentence and enter a fifteen year maximum term as statutorily mandated.

Affirmed.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 14th day of April in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable

MARY S. COLEMAN,
Chief Justice,

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 28-333

SC: 64348
COA: 78-3404
LC: 78-813790

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM HENRY ROBERTS,

Defendant-Appellant.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be

reviewed by this court.

0408

STATE OF MICHIGAN --ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is true trnascript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Supreme Court at Lansing, this 14th day of April in the year of our Lord one thousand nine hundred and eighty.

COURT SEAL

(signed) Corbin R. Davis Clerk
Deputy

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 23rd day of July in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable

CR 28-333a

MARY S. COLEMAN,
Chief Justice,

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR,
Associate Justices

SC: 64348
COA: 78-3404
LC: 78-813790

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM HENRY ROBERTS,

Defendant-Appellant.

On order of the Court, the motion by defendant-appellant for reconsideration of this Court's order of April 14, 1980, is considered, and the motion is DENIED, because it

does not appear that said order was entered erroneously.

0708

STATE OF MICHIGAN --SS.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Supreme Court at Lansing, this 23rd day of July in the year of our Lord one thousand nine hundred and eighty.

COURT SEAL

(signed) Corbin R. Davis Clerk
Deputy

CONSTITUTION OF THE UNITED STATES, AMENDMENT V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for pubic use, without just compensation."

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

MICHIGAN CONSTITUTION

ARTICLE 1 § 2:

"No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation."

ARTICLE 1 § 15:

"No person shall be subject for the same offense to be twice put in jeopardy. All persons shall, before conviction, be bailable by sufficient sureties, except for murder and

treason when the proof is evident or the presumption great."

Article 1, § 17:

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

M.C.L. 750.316:

"First Degree Murder--All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be comitted in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison ›

for life"

M.C.L. 750.317:

"Second Degree Murder--All other kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same."

M.C.L. 750.321

"Manslaughter--Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than 7,500 dollars, or both, at the discretion of the court."

M.C.L. 750.227b:

"(1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violation of section 227 or section 227a, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under

this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the personal shall be imprisoned for 10 years.

(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceeding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term imposed pursuant to subsection (1)."

USC 28 § 1257(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is

drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercied under the United States.